

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	

**CONSOLIDATED REPLY TO OPPOSITIONS
OF
CTC COMMUNICATIONS CORP.
GILLETTE GLOBAL NETWORK, INC. D/B/A EUREKA NETWORKS
GLOBALCOM, INC.
MCLEODUSA, INC.
MPOWER COMMUNICATIONS CORP.
PACWEST TELECOMM, INC.
TDS METROCOM, LLC
US LEC CORP.**

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SUMMARY

Contrary to BOC arguments on reconsideration, the proposed mergers of SBC with AT&T and Verizon with MCI are relevant to the scope of required unbundled access to ILEC networks that is the subject of the instant proceeding. The proposed mergers would create substantial new barriers to entry in the form of efficiencies and economies of scale that competitors could not duplicate, assuming even some of the overstated alleged benefits of the mergers are correct. In light of the greater impairment created by the mergers, the Commission should substantially expand the scope of unbundling established in this proceeding.

Because of the merger agreements, AT&T/SBC and Verizon/MCI are *presently* affiliated. In light of this affiliation, the Commission must require that AT&T and MCI not be counted as unaffiliated fiber-based collocators concerning SBC and Verizon, respectively, for purposes of initial implementation of the FCC's new UNE rules.

On reconsideration, the Commission must also provide for reclassification of wire centers where the wire center thresholds are no longer met. Unfortunately, contrary to BOC contentions, competition is unfortunately not necessarily always increasing. A decrease in fiber-based collocators, for example, is most likely explained by diminished competitive opportunities. If the Commission's wire center tests are accurate predictors of where competition is possible, the Commission must require reclassification of wire centers when circumstances change.

The Commission should rescind the EEL criteria. They were never necessary, and BOC concern on reconsideration over the possibility of bypass of special access is now clearly unjustified in light of the mergers and BOC in-region market share. Since BOCs are the dominant in-region long distance providers, and some are acquiring the IXC's that could allegedly bypass

special access, BOCs' concerns on this issue should be accorded little weight. Also, EEL criteria harm CLECs. They are obsolete in light of VOIP, and, in fact, nonsensical in an IP environment since the EEL criteria are designed to assure *local* service whereas the Commission has decreed that VOIP is inherently *interstate*. If the Commission does not abolish the EEL criteria it should at least establish a carve-out for local data service, based on CLEC self-certification, in order to prevent the harm caused by the EEL criteria to CLECs.

The Commission should reject the BOCs' opposition to Petitioners' request that the Commission modify and clarify in certain respects the methodology for counting business lines in a wire center. The Commission's definition of business line erroneously uses voice grade equivalents for DS1 and DS3 UNE loops. The Commission should prohibit BOCs from including residential UNE-L lines in business line counts and also require ILECs to employ a uniform methodology for counting UNE-P business lines. BOCs should not be permitted to evade the rule and inflate business line counts by including UNE-P and UNE-L lines provisioned to residential subscribers.

The Commission should also clarify that the *Triennial Review Remand Order* and the transition plan established therein does not abrogate existing interconnection agreements. Contrary to BOC contentions, *Sierra-Mobile* does not apply because the Commission did not purport to abrogate private interconnection agreements. In fact, the Commission specifically held that the *Triennial Review Remand Order* must be implemented through change-of-law provisions. Even if the *Triennial Review Remand Order* were self-effectuating as the BOCs' assert, the Commission should clarify that ILECs are still obligated to provision adds, moves, and changes

– which includes new lines – to embedded customers pursuant to the transition provisions of the *Triennial Review Remand Order*.

The Commission should also eliminate or modify the DS1 transport cap. At a minimum, the 10 DS1 transport cap should not apply where DS3s are available or when DS1 transport is used in an EEL combination. There is no basis for imposing the cap, especially in these instances, since the Commission never held that CLECs are “non-impaired” without access above 10 DS1s on transport routes where DS3 UNEs are available.

Finally, the Commission should clarify that ILEC facilities at reverse collocations at CLEC premises are dedicated transport, not entrance facilities. Contrary to Verizon’s claim, this would not eviscerate the non-impairment finding with respect to entrance facilities.

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CTC Communications Corp.; Gillette Global Network, Inc. d/b/a Eureka Networks;
Globalcom, Inc.; McLeodUSA, Inc.; Mpower Communications Corp.; PacWest Telecomm, Inc.;
TDS Metrocom, LLC; and US LEC Corp. (collectively "Petitioners"), by their undersigned
counsel, pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. Section 1.429, submit
this consolidated reply to the oppositions of BellSouth Corporation, Qwest Communications
International, Inc, SBC Communications, Inc., and Verizon to the Petition for Reconsideration
("Petition") of the of the *Triennial Review Remand Order* filed by Petitioners in this proceeding.¹

¹ *Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, WC Docket No. 04-313 and CC Docket No. 01-338, F.C.C. 04-290 (rel. Feb. 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*"). Section 1.4(h) of the Commission's rules provides that where a document is served by mail, as was the case here with the BOCs' oppositions to the Petition, and the filing period is ten days or less, an additional three days will be allowed to all parties for filing a response. To the extent necessary, Petitioners request a waiver of

I. THE SBC/AT&T AND VERIZON/MCI MERGERS REQUIRE A NEW IMPAIRMENT ANALYSIS

The Petition pointed out that the proposed mergers of AT&T with SBC and MCI with Verizon create alleged potential economies of scale vastly beyond those contemplated by the Commission in its impairment analysis in the *Triennial Review Remand Order*. In their oppositions to the Petition, BOCs either ignore the argument that the mergers are relevant to this proceeding or claim that this argument should be addressed in the merger dockets.²

Contrary to BOC assertions, this proceeding is the proceeding in which the Commission is considering when CLECs are impaired in their ability to provide competitive telecommunications services without access to UNEs. Therefore, the Commission may, and must, consider in this proceeding the impact on CLEC impairment of SBC's and Verizon's claimed efficiencies resulting from the proposed mergers.

An evaluation of the applicants' justifications for the mergers, namely increased efficiencies, if accurate, leads to a conclusion that CLECs will be relatively more impaired by the proposed mergers than if they do not take place. SBC claims that its merger with AT&T will save \$15 billion dollars.³ It says that the merger involves the combination of "firms that are recognized leaders in both enterprise and mass market services" and that the "combined com-

Section 1.429(g) of the Commission's rules to permit this Consolidated Reply to exceed ten pages. The Consolidated reply is considerably shorter than the total pages that would be filed with the Commission if Petitioners had chosen to file separate replies to each BOC opposition. Therefore, a waiver, to the extent necessary, would promote efficient consideration by the Commission of reconsideration issues.

² SBC Opposition at n.16.

³ Witte & Noguchi, at E01 (Feb. 1, 2005) ("Combining Operations should save the companies more than \$15 billion, as they merge networks and personnel"); SBC Press Release, <http://sbc.merger-news.com/materials/am.html>.

pany will be better able to offer a portfolio of services suitable for any customer.”⁴ SBC asserts that the “combined company’s increased scale also affords it considerably increased latitude to raise capital while maintaining any particular debt level.”⁵ The factors that the Commission employed to assess impairment, including economies of scale, first-mover advantages, absolute cost advantages, and barriers within control of the ILEC, are exacerbated by the overwhelming concentration of market power that will be wrought by these mergers. Thus, the unspoken (by the BOCs) flip side of the enormous savings and various efficiencies that these companies claim the mergers will achieve is that CLECs will not have comparable economies and advantages and, therefore, will be substantially more impaired by the mergers in their ability to provide competitive telecommunications services.

Accordingly, the Commission on reconsideration should conclude that, at least with respect to SBC and Verizon, that CLECs are potentially able to compete in far fewer wire centers than the Commission established in the *Triennial Review Remand Order*.

II. THE MERGER AGREEMENTS MAKE AT&T AFFILIATED WITH SBC AND MCI AFFILIATED WITH VERIZON FOR THE PURPOSES OF THE NEW IMPAIRMENT TESTS

In their oppositions, BOCs contend that the proposed mergers are irrelevant to counting fiber-based collocators because the existence of a fiber-based collocator demonstrates that competition is possible from a wire center and a subsequent merger or acquisition of the fiber-based collocator does not change the fact that competition has become possible from that wire center.

⁴ Merger of SBC Communications, Inc. and AT&T Corp., Description of the Transaction, Public Interest Showing, and Related Demonstrations, at 15 (filed Feb. 21, 2005) (“SBC Public Interest Showing”).

⁵ SBC Public Interest Showing, at 33.

Although BOCs' argument is invalid, as discussed in the next section, it misses the point concerning the impact of the proposed mergers on counting fiber-based collocators. The merger agreements make MCI with respect to Verizon and AT&T with respect to SBC *presently* affiliated. Because they are *presently* affiliated, the MCI and AT&T fiber-based collocations may not be counted as unaffiliated fiber-based collocators under the Commission's new UNE rules.

There no question that there is a present affiliation. The agreements to merge make the respective companies affiliated as a legal matter.⁶ And even if the agreements by themselves did not make the prospective merger partners affiliated, the companies' behavior, particularly with respect to regulatory proceedings, demonstrates the reality of a present affiliation. Most obviously, AT&T and MCI submitted joint merger applications in which these companies effectively repudiated all of their competitive advocacy over the last 20 years. Further, in the instant proceeding, AT&T and MCI did not file petitions for reconsideration and, unlike previous appeals, in this appeal are declining to take the lead. MCI did not file in the proceeding concerning special access pricing and AT&T filed only perfunctory comments. MCI withdrew its Petitions for Emergency Declaratory Relief regarding UNEs in many states.⁷ If AT&T and MCI were not presently affiliated with their respective merger partners they would not now be making these arguments or half-heartedly participating in this fashion.

⁶ See, e.g., *Wolfe Organization, Inc. v. Oles*, 705 A.2d 40, 45 (1998) (a bona fide executory contract "vests equitable ownership of the property in the contract purchaser"); *York Rubing, Inc. v. Adcock*, 634 A.2d 39 (1993).

⁷ See, e.g., MCI Letter to Honorable Jaclyn Brilling, Case No. 04-C-0314, Petition of Verizon New York for Consolidated Arbitration to Implement Changes in Unbundled Network Element Provisions in Light of the Triennial Review Order, at 1 (March 10, 2005); James Laskey Letter to Ms. Kristi Izzo, Docket No. TO03090705, In the Matter of Implementation of the FCC's Triennial Review Order, at 1 (March 10, 2005).

Accordingly, AT&T is presently affiliated with SBC and MCI is presently affiliated with Verizon and the Commission should so determine for purposes of counting fiber-based collocators under the new UNE tests. To the extent SBC and Verizon have counted their merger partners as unaffiliated, the Commission should provide for rate true-ups insofar as SBC or Verizon have denied any CLEC orders for UNEs because of it.

III. THE COMMISSION SHOULD REQUIRE RECLASSIFICATION OF WIRE CENTERS WHERE LINE COUNTS OR FIBER-BASED COLLOCATORS CHANGE

BOCs contend that the Commission on reconsideration should not require or permit reclassification of wire centers where business line counts or the number of fiber-based collocators drop. They contend that the tests established by the Commission were intended to address the requirement of *USTA II* that UNE rules identify where competition is possible, not just where it has already occurred. BOCs claim that drops in line counts or fiber-based collocators do not show that competition is no longer possible from a wire center that has previously met the new UNE tests. BOCs further claim that a drop in line counts is most likely to be attributable to increased competition, not the reverse.

BOCs' contentions are erroneous for a number of reasons. The BOCs' rosy assumption that the potential for competition will always increase and never decline is false based on the competitive industry experience over the last few years. There are fewer CLECs now than there were in 2000. Further, competition can be "regulated away" as has been the case most obviously

with UNE-P.⁸ Accordingly, a general assumption that once a wire center meets the new UNE tests competition will always be possible from that wire center is unwarranted.

Moreover, the “once competitive always competitive” view is not supported by the tests adopted by the Commission. For example, the number of fiber-based collocators may drop because CLECs erred in the first place in assuming that competition was economically feasible from a wire center. Many CLECs over the last five years have terminated fiber-based collocations, reflecting a decline in the possibility of competition, not the other way around. Similarly, a drop in line counts is not related to the potential for facilities-based competition from a wire center. Competition from non-facilities-based VOIP providers, for example, could account for line count drops but that would not directly reflect the potential for facilities-based competition from that wire center.

Petitioners recognize that an impairment test will never measure the actuality of, or potential for, competition with complete accuracy. However, for the reasons discussed above, there is no basis for an approach that, going forward, can only reduce access to unbundled network elements even when the Commission’s criteria seeking to identify competitive environments are no longer met. Assuming that the Commission’s tests are predictors of where CLECs are not impaired, the Commission must follow those criteria consistently on a going forward basis, including where competitive thresholds are no longer met. On the present record, there is no basis for the Commission to assume that the potential for competition remains if its tests designed to identify where competition is possible are no longer met. Significantly, there was no explanation or justification in the *Triennial Review Remand Order* for the “once competitive,

⁸ *Junk This*, Telephony, May 23, 2005, p. 18, also available at http://telephonyonline.com/mag/telecom_junk/index.html.

always competitive" approach. It would be arbitrary and capricious for the Commission to retain it.

Accordingly, on reconsideration, the Commission should provide that wire center classifications shall change in either direction in accordance with the Commission's test as circumstances change.

IV. THE COMMISSION SHOULD ABANDON EEL CRITERIA OR, AT A MINIMUM, ESTABLISH A CARVE-OUT FOR DATA SERVICES

A. EEL Criteria Should be Rescinded

If BOC concerns about the "evasion" of special access by IXC's ever had any substance, they are invalid today. First, SBC and Verizon are acquiring the very IXC's that they thought posed the greatest risk of substitution of UNEs for special access. As affiliates of BOC's, it is very unlikely that AT&T or MCI would attempt to do so either in-region or otherwise. Therefore, the mergers substantially attenuate BOC concerns, assuming they were otherwise valid. Moreover, BOC's have gained substantial in-region market shares for long distance service. This also substantially reduces any concerns about evasion of special access in direct proportion to the BOC's market share because there is no risk of "evasion" of the BOC's special access with respect to its own long distance service. Overall, taking into account both the mergers and BOC's market share, the risk of "evasion" of over priced special access is now reduced by over 50%, assuming any validity of the claims in general. Accordingly, contrary to BOC statements, the current risk of evasion of special access, in contrast with five years ago, is greatly reduced and should not be accorded substantial weight in assessing the need for continuation of the EEL restrictions.

On the other hand, the current EEL restrictions are very harmful to CLECs because they do not very well accommodate data services. Although BOCs state that the current EEL restrictions focus on voice service, as if that were a justification for them, that is precisely the problem with the Commission's "architectural safeguards." Those standards were designed to prevent IXC's from using UNEs to provide voice service but they hinder CLECs' ability to provide local data services as well.

In particular, the EEL architectural standards are obsolete because of VOIP. VOIP is a data service. The current EEL restrictions will preclude CLECs from full participation in the IP revolution if they are saddled with these bureaucratic restrictions (such as trunk ratios) imposed due to BOC hysteria over IXC evasion of special access even as the BOCs acquire the largest IXC's. Further, the Commission has declared VOIP to be an *interstate* service⁹ while the "architectural standards" require a network structure intended to assure that EELs are used for some *local* voice service. Although EEL restrictions are, therefore, nonsensical in an IP environment, BOCs will try to apply them there. The EEL restrictions also hinder CLECs' ability to provide a host of other useful local data services that CLECs could provide but for the EEL restrictions. While the Commission is ostensibly attempting to encourage the development of broadband services, applying the EEL restrictions at this point to CLECs will have the opposite result and/or simply foreclose CLEC participation in the broadband market. BOCs, of course, would be the first to complain about the Commission imposing network architecture requirements on them, but they have no problem with imposing these artificial restrictions on CLECs, especially since

⁹ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Service Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004).

they provide the added benefit to BOCs of hindering CLEC participation in the IP-enabled marketplace.

Moreover, the Commission's prohibition in the *Triennial Review Remand Order* on use of UNEs exclusively for long distance service is very likely unlawful. In *USTA II*, the Court correctly found that UNEs may be used for any telecommunications service and that the statute requires the Commission to subject all telecommunications services to an unbundling analysis.¹⁰ However, in the *Triennial Review Remand Order* the Commission dispensed with any impairment analysis for long distance service and simply prohibited use of UNEs exclusively for long distance service based on a cost benefit analysis. While *USTA II* states that it expected the Commission to find that CLECs were not impaired for long distance service, this did not authorize the Commission to dispense with an impairment analysis entirely. In addition, although *USTA II* approved the Commission's use of "at a minimum" in the context of establishing broadband relief, in that case the Commission considered impairment in addition to its broadband goals. (Nor was the sweeping determination that long distance service is "sufficiently competitive" granular as required under *USTA I*.)

Significantly, none of the BOCs actually address the argument raised in the Petition, namely that the Commission failed to conduct an impairment analysis. In effect, the Commission in the *Triennial Review Remand Order* has simply reestablished the previous and now unlawful qualifying services standard by a new unlawful means. Accordingly, apart from the fact that there is no need for them, the EEL restrictions are also unlawful because the prohibition on long distance service that the Commission uses to justify the restrictions is also unlawful.

¹⁰ *TRRO*, ¶ 31.

On reconsideration, in light of the substantially attenuated BOC "need" for the restrictions, the harm to CLECs, and the unlawfulness of the prohibition on use of UNEs to provide long distance service, the Commission should conclude that the harms outweigh any possible benefits and rescind the EEL restrictions. To the extent a prohibition on use of UNEs exclusively for long distance service is retained, the Commission may rely on its enforcement authority as a sufficient safeguard against violations.

If the Commission erroneously retains the EEL restrictions, it should establish a carve-out for local data services that would permit, as an alternative to existing restrictions, a CLEC to obtain the EEL if it certifies that it will use the EEL in part to provide local data service. The BOCs have not provided any arguments in opposition to this proposal that can be taken seriously. They contend that a carve-out would repudiate the EEL standards, but that is not the case because the carve-out would only be an alternative to current restrictions. Nor does it pose a risk of substitution of UNEs for special access for provision of interexchange service because the CLEC would be required to certify that it provides some local data service.

In reality, BOC opposition to a carve-out for provision of local data service is an attempt to prevent CLECs from participating in provision of data services where they are impaired without access to UNEs. The Commission should reject BOC opposition out of hand and establish that CLECs may obtain EELs as long as they certify that they will use the EEL in part for provision of a local data service.

V. THE COMMISSION SHOULD MODIFY AND CLARIFY IN CERTAIN RESPECTS THE METHODOLOGY FOR COUNTING BUSINESS LINES IN A WIRE CENTER

A. The Commission's Definition of Business Line Erroneously Uses Voice Grade Equivalents

In the *Triennial Review Remand Order*, the Commission required that for purposes of counting business lines DS1 and DS3 UNE loops would be counted based on voice grade equivalents ("VGEs"), e.g. 24 lines for each DS1. The Petition explained that this was erroneous because this approach would not accurately capture revenue opportunities associated with wire centers because CLECs do not obtain revenues for high capacity UNE loops equivalent to VGEs. Instead, CLECs use high capacity loops for provision of several voice channels plus data service, which produces far less revenue than the revenue that would be associated with the equivalent number of voice channels.

In opposition, BOCs do not dispute that fewer revenue opportunities are associated with high cap loops than what would be predicted based on VGEs. However, they contend that use of VGEs to count high capacity UNE loops is irrelevant because business line density was merely a proxy for revenue opportunities and that as long as the Commission uses a consistent methodology for developing wire center thresholds and for applying them, i.e. counting business lines, it doesn't matter if VGEs misrepresent revenue opportunities.¹¹ According to Verizon, it is "plain error for the Commission to use one line-counting methodology for setting the thresholds and another for determining whether those thresholds are satisfied."¹²

¹¹ Verizon at 35-36; SBC at 19-20.

¹² Verizon at 35.

In this connection, they contend that the data that the BOCs submitted based on which the Commission adopted the wire center thresholds used VGEs to count high capacity UNE loops and that, therefore, BOCs should use VGEs in applying those thresholds. Thus, SBC avers that the information the Commission relied on when it established the business line thresholds “[were] based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops, with the latter two components measured on a 64-kbps equivalent basis.”¹³

Contrary to the BOCs assertions on reconsideration, the business line counts submitted by them on which the Commission relied did not use VGEs to count high capacity UNE loops. Tellingly, in SBC’s, Qwest’s and BellSouth’s previous letters to the Commission, they openly admit they did not use VGEs in counting UNE loops. In its February 18, 2004 letter to the Commission that listed the business lines and fiber-based collocators in SBC’s wire centers, SBC specifically states that “SBC’s December 7 and December 10, 2004 filings used different criteria that did not account for voice grade equivalents for UNE lines (CFR § 51.5).”¹⁴ Similarly, in a letter BellSouth filed the very same day, BellSouth stated that “[w]hen the Commission requested that BellSouth submit wire center data in December 2004, ... BellSouth did not use the 64 kbps-equivalent approach.”¹⁵ Qwest also explained “The December data counted each UNE-

¹³ SBC at 20.

¹⁴ Letter from James C. Smith, Senior Vice President, SBC Services, Inc., to Jeffery J. Carlisle, Chief, Wireline Competition Bureau, WC Docket No. 04-313, at n.2 (Feb. 18, 2005).

¹⁵ Letter from Bennett L. Ross, General Counsel, BellSouth D.C., Inc., to Jeffery J. Carlisle, Chief, Wireline Competition Bureau, FCC, WC Doc. No. 04-313, CC Doc. No. 01-338, at 1 (Feb. 18, 2005); *see also* Letter from Bennett L. Ross, General Counsel-D.C., BellSouth D.C., Inc., to Thomas Navin, Chief, Wireline Competition Bureau, FCC, WC Docket No. 04-313, at 2 (June 3, 2005) (noting that “with the exception of Basic Rate and Primary Rate ISDN lines, the December 2004 wire center filing did not count retail or wholesale digital access lines on a per 64 kbps-equivalent basis, as the Commission rules require. For example a DS1 loop was counted in the original filing as one line when it should be counted as 24 lines under the Commission’s rules.”).

loop as one business line, including DS1s and DS3s.”¹⁶ Based on Verizon’s December 7, 2004 filing, it appears that Verizon did the same thing.¹⁷

Accordingly, assuming that the BOCs are correct that the Commission must employ a consistent methodology in establishing thresholds and applying them,¹⁸ the Commission must rescind its rule requiring VGEs when counting high capacity loops.¹⁹ Petitioners suggest that the new rule count DS1 loops as one line since DS1 is rapidly becoming the standard offering to homes and businesses.

¹⁶ Letter from Cronan O’Connell, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Doc. No. 04-313, CC Doc. No. 01-338, at 2 ¶ 4 (Mar. 7, 2005).

¹⁷ Letter from Edwin J. Shimizu, Director, Federal Regulatory Affairs, Verizon, to Marlene Dortch, Secretary, FCC WC Doc. No. 04-313, CC Doc. No. 01-338, App. (Dec. 7, 2004) (information provided does not suggest that UNE loops were counted on a VGE basis).

¹⁸ If the Commission permits BOCs to count lines in a manner different than how line counts were submitted to the Commission during the course of this proceeding, then the Commission should require BOCs to count Centrex lines in accordance with the line-to-trunk equivalency ratio already established by the Commission. *Access Charge Reform*, Second Order on Reconsideration and Memorandum Opinion and Order, CC Docket Nos. 96-262, 94-1, 91-213, FCC 97-368, ¶ 31 (rel. October 9, 1997). See 47 C.F.R. Sections. 69.153(e), 69.158. For all the reasons stated by the Commission in establishing this ratio, including that Centrex and PBX service are functionally equivalent, and enable the customer to concentrate usage from multiple lines to a few trunks, the one-to-nine line-to-trunk ratio established by the Commission in the *Access Charge Reform Order* better reflects revenue opportunities than BOCs’ self-serving method of counting each subscriber station as one line.

¹⁹ Verizon also claims that because the business line count is taken from ARMIS data which is based on the voice grade equivalent rule, there is no error in using the same rule for UNE loops. Verizon at 35. Verizon misses the point because the business line thresholds the Commission established in the *TRRO* only applied the VGE rule to ARMIS data and did not apply them to UNE loops. Verizon and SBC also attempt to diminish the need for reconsideration of this issue on the grounds that “any supposed over-counting from the use of 64 kbps is immaterial” because the Commission’s business line counts ignore loops that entirely bypass the incumbents’ network should be dismissed readily. Verizon at 37; SBC at 22. The Commission has already taken this into account and has lowered the business line density thresholds “to account for incumbent line loss due to facilities that bypass the incumbents loop network altogether, including the loss from intermodal competition.” *TRRO*, ¶ 104.

B. The Commission Should Prohibit BOCs From Including UNE-L lines That Are Used to Serve Residential Lines in Business Line Counts

The Petition requested that the Commission on reconsideration clarify that business line counts may not include residential customers served by CLECs via UNE-L. In their opposition, Verizon, SBC, and BellSouth essentially confirm that in their initial implementation of the Commission's new UNE rules they have counted residential UNE-L lines as business lines.²⁰ BOCs also claim that they are unable to identify residential UNE-L customers because CLECs do not currently report whether UNE-L is being used to provision business or residential services.²¹ Verizon similarly asserts that incumbents do not track residential UNE-L lines and that there is no meaningful way to obtain this data.²² Verizon and SBC further claim that it doesn't matter that they count residential UNE-L lines as business lines because residential UNE-L customers are not "competitively significant."²³

BOCs' statements in response to the Petition affirm that they have violated the Commission's rules by including residential lines in their business line counts. They have provided no reason why this creates anything other than erroneous line counts and a false implementation of the Commission's new UNE rules. Moreover, contrary to the BOCs' claims, many CLECs, including TDS and Mpower, for example, use UNE-L to provision residential services. CLECs providing service to residential customers could be disproportionately harmed by BOCs' error in this regard because the wire centers from which they obtain UNEs to serve residential customers

²⁰ Verizon at 37; SBC at 21; BellSouth at 10.

²¹ BellSouth at 10.

²² Verizon at 37.

²³ SBC at 21; Verizon at 37.

will be less available due to BOCs erroneously counting residential customers as business customers.

In addition, pursuant to the both Bell Atlantic/GTE and SBC/Ameritech merger conditions, Verizon and SBC were both required to provide a discount on UNE loops that serve residential customers.²⁴ While SBC contends it implemented that discount by requiring CLECs to track any loops they used to serve residential customers,²⁵ and that CLECs would have no incentive to provide that information now,²⁶ CLECs that serve residential customers would be more than happy to provide this information to BOCs in order to assure a more accurate implementation of the Commission's rules. At a minimum, BOCs could ask CLECs to voluntarily report residential UNE-L lines and then the BOC could at least exclude those lines. Therefore, ILECs are capable of identifying residential UNE-L lines.

Accordingly, the Commission should clarify that UNE-L used to provision residential services should not be included in business line counts and direct ILECs to redefine wire centers after excluding residential UNE-L.

²⁴ *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032, FCC 00-221, ¶ 307, 309, Appendix D ¶ 35 (2000); *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, FCC 99-279, ¶¶ 391, 393, Appendix C ¶ 45-46, ¶ 51 (1999).

²⁵ SBC at n.15.

²⁶ SBC at n.15.

C. The Commission Should Require ILECs to Employ a Uniform Methodology for Determining UNE-P Business Lines²⁷

The Commission's new UNE rules specify that business lines include business lines served via UNE-P.²⁸ The Petition pointed out that Qwest apparently used a scheme for separating residential from business UNE-P lines based on residential/business ratios of white pages listings and requested that the Commission establish a reasonable, consistent methodology of counting business UNE-P lines. Absent this, BOCs' counting of residential UNE-P is ripe for abuse, error, and self-serving counting methodologies. SBC, BellSouth, and Verizon do not respond to the Petition on this issue, confirming that there is substantial cause for concern on how BOCs are counting business UNE-P lines. Qwest merely restates its methodology.²⁹

On reconsideration, the Commission should adopt a uniform methodology that BOCs must employ when counting UNE-P business lines that is not based on assumptions but rather is based on actual counts of such lines. As noted in the petition, BOCs are otherwise likely to seriously harm CLECs by counting the millions of residential UNE-P lines as business lines.

VI. THE COMMISSION SHOULD CLARIFY ASPECTS OF ITS TRANSITION PLAN THAT ILECS HAVE MISCONSTRUED

A. The Commission Must Clarify that the Transition Plan Does Not Preempt Existing Contractual Arrangements

Verizon, SBC, and BellSouth argue and have unilaterally decided as a matter of self-interest to proclaim that the *Triennial Review Remand Order* is "self-effectuating."³⁰ As such, these BOCs generally contend that the new FCC rules, unlike old ones, (1) automatically

²⁷ Gillette Global Network, Inc. d/b/a Eureka Networks does not join in this argument.

²⁸ *Triennial Review Remand Order*, ¶ 105.

²⁹ Qwest at 7-8.

³⁰ Verizon at 6-10; SBC at 33-39; BellSouth at 27-32.

superceded the terms of the parties' Agreements on March 11, 2005 and (2) do not even need to be incorporated into the Agreement, now or ever – regardless of the change-of-law terms of the parties' current agreements. This interpretation is contrary to the Act and the Agreements, and is stunningly inconsistent with the BOCs' mantra over the years that CLECs cannot obtain UNEs pursuant to FCC rules until those rules are implemented in effective interconnection agreements.

For instance, in the past, Verizon has insisted that Congress intended interconnection agreements, and not FCC regulations, to be “the crucial implementation mechanism of the Act,” explaining:

First and foremost ... Congress required carriers to rely initially on private negotiations to establish their interconnection agreements.... Congress provided an incentive for negotiations by freeing negotiated agreements from the standards defined in section 251.³¹

As Verizon explained, Congress explicitly permitted carriers to agree on terms that exceeded, fell short of, or differed from the requirements of the Act or FCC rules.³² Even though Verizon does not make a regular habit of doing so, this ability to deviate from statutory duties underpins what (prior to the *Triennial Review Remand Order*) had been the ILECs' overriding interpretation of the Act – that because the Act “first and foremost” intended carriers “initially” to rely on private negotiations,³³ and because in such negotiations carriers could make tradeoffs that might differ from parts of the FCC's rules, CLECs could not directly assert any rights under

³¹ *Verizon North, Inc. v. Strand*, No. 01-1013 (6th Cir. 2002), Brief of Verizon North, Inc. at 9, 25 (June 20, 2001) (“*Verizon Strand Brief*”).

³² 47 U.S.C. § 252(a)(1) (“an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251”).

³³ *Verizon Strand Brief* at 9.

the FCC rules themselves, but instead were required to execute an interconnection agreement before the BOCs would provide them with *anything*. In other words, because a CLEC could agree to trade off its right to a UNE in exchange for some other benefit, it would undermine such negotiations for the CLEC later to claim that it could obtain the same UNE directly under “self-effectuating” rules.³⁴ Verizon’s and SBC’s counsel in this proceeding put it this way:

Under the language and structure of the 1996 Act, the obligations between ILECs and CLECs are governed in the first instance by their interconnection agreements. Indeed, absent such an agreement an ILEC has no obligation to make *any* facilities available to the CLEC, much less on the terms and conditions [required by the FCC’s Section 251 regulations].³⁵

BOCs have routinely relied on this position to deny CLECs access to UNEs until interconnection agreements and/or amendments were executed and effective. When the Commission established its initial list of UNEs in 1996, and when it added to that list in 1999, BOCs contended that these UNE rules were not self-effectuating, but must instead be implemented in an agreement before they apply to a CLEC. Similarly, the *Triennial Review Order* in 2003 clarified that CLECs are entitled to routine network modifications and commingling, but Verizon has asserted the right to deny CLECs such access until they execute a *Triennial Review Order* amendment. Only now, because the new rules in the *Triennial Review Remand Order* largely benefit ILECs, BOCs conveniently have decided, in a complete about-face, that *those* rules should be deemed to apply automatically without any need or role for negotiation. The BOCs new position flies in the face of its past rationale: if Congress had intended the Act to be implemented in that manner, it never would have needed to create the

³⁴ See, e.g., *Wisconsin Bell v. Bie*, 340 F. 3d 441, 444 (7th Cir. 2003).

³⁵ *SBC v. FCC*, D.C. Cir. Docket No. 03-1147, Brief of SBC Communications, Inc. at 15 (September 28, 2004) (emphasis original).

interconnection agreement process in the first place. Moreover, if Commission rules bound the parties without ever being incorporated into agreements, then the Commission would have had no reason to expressly provide that the new rules adopted in the *Triennial Review Order* and *Triennial Review Remand Order* would be implemented through the interconnection agreement change of law processes.³⁶

The BOCs' entanglement with its prior theories does not stop there. They ignore the obvious corollary to its position that carriers may negotiate terms that are different from the Act or the FCC rules including any change-of-law terms they wish. For example, carriers have been free to agree to make their contracts immune from changes of law during the course of their term – as many carriers did at one time in Texas, for example.³⁷ If Commission rules were deemed to become effective automatically, without regard to the terms of the existing agreement, these previously negotiated change-of-law terms would be rendered meaningless.

The BOCs have expressly argued in the past that regulators could not impose new rules that would override a contract without regard to the terms of the agreement. Verizon even argued to the Ninth Circuit that “local carriers have the right to contract around [a federal] requirement, and state commissions are bound to honor the terms of the parties’ agreements.”³⁸ Verizon

³⁶ See, e.g., *TRO*, ¶ 701 and *TRRO* at nn.408, 524, & 630

³⁷ SBC and numerous CLECs signed interconnection agreements starting in 2000 that agreed that the contracts would not be modified during their three-year term based upon changes to SBC's § 251 obligations. By contrast, the reason that many CLECs are now subject to the elimination of certain UNEs and the price increases under the Commission's transition rules is not directly because the Commission changed its rules, but only because their contracts with the BOCs call for prompt amendments to implement changes of law. Had the parties instead executed contracts that were immune from changes of law during the course of their term, the BOCs would have no right to impose the *TRRO* changes on the CLECs until the existing agreements could be terminated and replaced with new contracts.

³⁸ *Pacific Bell v. Pac-West Telecomm, Inc.*, Nos. 01-17161, 01-17166, 01-17181 (9th Cir.) Brief of Verizon California, Inc., 2002 WL 32096503 (March 15, 2002) (emphasis added).

added that this principle applied to change-of-law provisions of interconnection agreements, such that some agreements may require automatic implementation of new FCC rules while others may prescribe some other result, and that a change in law “require[s] a case-by-case analysis of whether contracts at issue contained change-of-law provisions.”³⁹ The Ninth Circuit agreed with Verizon, and found that across-the-board application of new state rules without regard to the change of law and other terms of an agreement “effectively changes the terms of [the agreements], and therefore contravenes the Act’s mandate that interconnection agreements have the binding force of law.”⁴⁰

Since the primacy of interconnection agreements is based upon the directions of Congress, the Commission would similarly be precluded by Section 252 from imposing “self-effectuating” terms that would automatically override the parties’ interconnection agreements without regard for the terms of such agreements. But even assuming the Commission had the authority to override interconnection agreements in a general rulemaking proceeding, which it does not as explained below, the Commission has said clearly that it did not intend to override contract terms or the Section 252 process. Instead, it specifically provided that the *Triennial Review Remand Order* be implemented in accordance with the Section 252 negotiations process. See *Triennial Review Remand Order*, ¶ 233. The Commission gave only one reason for choosing a specific effective date (March 11, 2005): to avoid temporary and unnecessary disruption that could have resulted for a few days as a result of the different schemes adopted by

³⁹ *Id.*

⁴⁰ *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2002) (citing 47 U.S.C. § 252(a)(1)).

the *Triennial Review Remand Order* and the prior *Interim Order*.⁴¹ Other than that, the March 11 effective date should be accorded the same significance as the effective date of prior FCC orders, and not be misconceived as a cryptic and unprecedented mandate for an automatic override of interconnection agreements.⁴²

Thus, for the same reasons that the BOCs have argued repeatedly for years, the *Triennial Review Order* and *Triennial Review Remand Order* can only be implemented in accordance with the change of law terms of the parties' Agreements, which Verizon has explained "state commissions are bound to honor."⁴³ To be clear, that fact will not change the ultimate outcome that the § 251 UNEs eliminated by the *Triennial Review Order*⁴⁴ and *Triennial Review Remand Order* will be removed from interconnection agreements, whose terms do require the implementation of changes of law. But the Agreements and the Act preclude these BOCs' interpretation that the *Triennial Review Remand Order* is somehow "self-effectuating." Instead, the Amendment that implements the *Triennial Review Remand Order* should become effective

⁴¹ *TRRO*, ¶ 236. The *Interim Order* had established rules under which, if incorporated into the parties' interconnection agreements, would have resulted in the brief imposition of certain transition terms on March 15, 2005 that differed from those established by the *TRRO*. The FCC therefore explained that it chose to make the *TRRO* effective on March 11, 2005 to avoid that specific scenario.

⁴² Verizon, SBC and BellSouth cite a string of cases supporting their position that the *TRRO* should be interpreted as self-effectuating. Since these decisions attempt to interpret the *TRRO*, they are immaterial here because the Commission can clarify what it meant and need not rely on the interpretation of its own decision offered by other bodies.

⁴³ *Pacific Bell v. Pac-West Telecomm, Inc.*, Nos. 01-17161, 01-17166, 01-17181 (9th Cir.), Brief of Verizon California, Inc., 2002 WL 32096503 (March 15, 2002).

⁴⁴ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003), corrected by Errata, 18 FCC Rcd 19020 (2003) ("*Triennial Review Order*" or "*TRO*") (subsequent history omitted).

only upon execution, and it should provide the detailed terms that are necessary or warranted to implement *all* of the Commission's new rules.

1. The Commission Lacks Authority to Supersede Binding Interconnection Agreements and Even if it had the Authority, It Never Exercised it.

Apart from the fact that interconnection agreements need to be amended to the extent required by the change of law terms of the agreements for the to go into effect under them, Verizon and SBC erroneously contend that the Commission has the authority under the *Mobile-Sierra* doctrine to override the terms of these agreements.⁴⁵ As discussed in the Petition, the Commission's authority under this doctrine only permits the Commission to override rates in contracts that are "filed with the FCC."⁴⁶ It does not authorize the Commission to dictate which services will or will not be offered under a contract, nor provide the Commission legal authority to abrogate existing contractual provisions that are the province of state commissions charged under the Act with the duty of approving such provisions.⁴⁷ Thus, the Commission has no authority in the *Triennial Review Remand Order* abrogate terms in existing interconnection agreements and it even recognizes this.⁴⁸

However, even if the Commission did have such authority (which it doesn't), it never explicitly exercised that authority nor stated that it was doing so in the *Triennial Review Remand*

⁴⁵ Verizon at 12-14; SBC at 39-42.

⁴⁶ *Cable & Wireless, P.L.C. v. F.C.C.*, 166 F.3d 1224, 1231-1232 (D.C. Cir. 1999).

⁴⁷ See letter from Christopher J. Wright, Counsel for Z-Tel, to Marlene H. Dortch, Secretary, FCC, CC Doc. 01-338, at 5-9, (Jan. 30, 2003).

⁴⁸ *IDB Mobile Communications, Inc. v. COMSAT Corporation*, File No. E-97-48, 16 FCC Red 11474, FCC 01-173, n.50 (May 22, 2001) (noting that "the *Sierra-Mobile* analysis does not apply to interconnection agreements reached pursuant to sections 251 and 252 of the Act, because the Act itself provides the standard of review of such agreements. See 47 U.S.C. § 252(e)(2)").

Order.⁴⁹ The *Mobile-Sierra* doctrine requires this. Indeed, it holds that where an agency has the power to abrogate private agreements the agency may only do so if it makes an express and unequivocal finding in an order that contractual arrangements are being abrogated and that doing so is in the public interest.⁵⁰ Absent such specificity, it cannot be assumed presumptively that the Commission has exercised such authority by doing its job and rendering decisions that are in the public interest. If that were the case and based on the BOCs' arguments, every Commission decision could potentially be deemed to abrogate private contracts, which of course is not the case.

For the foregoing reasons, the Commission should clarify that it did not attempt to supercede binding interconnection agreements in the *Triennial Review Remand Order* as of March 11, 2004.⁵¹

B. The Commission Should Clarify That True-Ups Do Not Apply Except Where Parties Have Specifically Addressed True-Up In Their Existing Change Of Law Provisions.

SBC contends that the rate increases adopted in the *Triennial Review Remand Order* trump interconnection agreements or any other alternative arrangements.⁵² It claims that if the

⁴⁹ Rather, it emphasized in paragraph 233 of the *TRRO* that it expected "incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act" and that "carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order." *TRRO*, ¶ 233. It further noted that "parties to the negotiating process will not unreasonably delay the implementation of conclusions adopted in this Order" and asked state commissions to "monitor this area closely to ensure that parties do not engage in unnecessary delay." *TRRO*, ¶ 233.

⁵⁰ See *Texaco Inc. v. FERC*, 148 F.3d 1091, 1097 (D.C. Cir. 1998); *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501, 1501-02 (D.C. Cir. 1987).

⁵¹ Verizon and SBC argue that under *Callery*, the Commission can undo what is wrongfully done by virtue of its order or otherwise implement judicial reversals. Verizon at 11; SBC at 40. Although *Callery* may stand for this proposition, it does not provide the Commission with separate and independent authority that is unrelated to the *Sierra-Mobile* doctrine to abrogate contracts. Therefore, *Callery* is inapplicable here.

parties are unable to reach agreement, the “default” rules established in the *Triennial Review Remand Order* apply automatically, including the increased transitional rates the Commission established in the order.⁵³

Contrary to SBC’s claims, the Commission does not have the authority to impose a generally-applicable provision for true-up either for the UNEs impacted by the *Triennial Review Order* or *Triennial Review Remand Order* that may deviate from the contractual provisions for true-up that already exist in a CLEC’s interconnection agreement with an ILEC. As explained above, the *Triennial Review Remand Order* can only be implemented in the interconnection agreements in accordance with their existing change of law terms. If those terms call for true-up upon a change of law, *as some agreements do*, then true-up will occur in accordance with the *Triennial Review Remand Order* even without the inclusion of true-up language in the new Amendment.⁵⁴ But where the existing agreements instead provide for changes of law to be implemented in new amendments, which would become effective upon execution, then ILECs cannot travel back in time to redraft the rules of the contract that apply to this round of the change in law, regardless of the FCC’s reference to true-up in the *Triennial Review Remand*

⁵² SBC at 46.

⁵³ SBC at 46.

⁵⁴ In the *TRRO*, the Commission explained that high-capacity loops, dedicated transport, and UNE-P arrangements “no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon the amendment of the relevant interconnection agreements, including any applicable law changes.” *TRRO*, nn. 408, 524, 630 The relevant interconnection agreements in this context are the agreements that specifically allow for true-ups. Notably, true-up provisions in interconnection agreements are risky for both parties (rates may go up or down and one party has to pay). Because the parties to these agreements enter into contracts with their end user customers that normally reflect fixed rate structures, the costs of retroactive true-ups therefore fall directly on the party that has to pay and cannot be passed along to the customers on a retroactive basis. For this reason, parties to interconnection agreements may seek certainty (rather than gamble) and mutually agree that retroactive true-ups are not available under the agreements. As to these agreements, the *TRRO*’s true-up determinations should not apply to them.

Order. That is because the parties have already determined, as a matter of contract, how changes in law are to be implemented. If the Commission were to impose true-up in such a situation, it would upset the contractual relationship on which parties have relied and which the Commission had previously approved – a contractual relationship that Verizon has elsewhere claimed that “state commissions are bound to honor.”⁵⁵

It is Petitioners’ position that certain contracts do not permit automatic implementation of rate increases, but instead would have rate increases take effect if and when they are embodied in an amendment to the agreement. But SBC would circumvent and make a mockery of that limitation if it could then upon execution impose true-up; a true-up would essentially be the same result as automatic implementation. If a contract bars automatic implementation and makes no reference to true-up, it clearly bars retroactive true-up as well. For these reasons, the Commission should make clear that the true-ups ordered in the *Triennial Review Remand Order* only apply where parties have expressly allowed for true-up in their existing interconnection agreements.

C. The Commission Should Clarify that the Transition Plan Allows CLECs to Continue Serving Existing Customers⁵⁶

Verizon, SBC and BellSouth contend that CLECs are not allowed to add new lines for existing customers or obtain de-listed UNEs when existing/embedded customers move to different locations.⁵⁷ Their position, however, is entirely inconsistent with the plain meaning of the *Triennial Review Remand Order*. As discussed above, implementation of the *Triennial*

⁵⁵ *Pacific Bell v. Pac-West Telecomm, Inc.*, Nos. 01-17161, 01-17166, 01-17181 (9th Cir.) Brief of Verizon California, Inc., 2002 WL 32096503 (March 15, 2002) (emphasis added).

⁵⁶ Gillette Global Network, Inc. d/b/a Eureka Networks does not join in this argument.

⁵⁷ Verizon at 14-16; SBC at 42-44; BellSouth 29-32.

Review Remand Order requires that interconnection agreements be amended; i.e., the *Triennial Review Remand Order* is not self-effectuating as they assert. However, even if it were, ILECs are still obligated to provision adds, moves, and changes⁵⁸ – which includes new lines – to embedded customers pursuant to the transition provisions of that order.

As to high capacity loops and dedicated transport, the *Triennial Review Remand Order* requires that, at a minimum, an ILEC provision moves, adds and changes associated with a CLEC's embedded customers until the interconnection agreement between ILEC and the CLEC is amended. Paragraph 233 of the *Triennial Review Remand Order* demonstrates this and explains that the Commission expected that changes of substantive law would be administered pursuant to the § 252 process, under state supervision. Tellingly, if the Commission did not mean this, it certainly never would have stated that high-capacity loops and dedicated transport facilities "no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon the amendment of the relevant interconnection agreements, including any applicable law changes."⁵⁹

With respect to embedded UNE-P customers, the *Triennial Review Remand Order* is unequivocal. In paragraph 199 of the order, the FCC explains that,

Finally, we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order. This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching. During the twelve-month transition period, which does not supersede any alternative

⁵⁸ A move order is submitted by a CLEC to an ILEC when an existing CLEC customer moves to a new address. An add order is submitted when an existing customer seeks to add an additional line to his service. A change order is submitted when an existing customer seeks to add or delete a feature, such as three-way calling.

⁵⁹ *TRRO*, nn.408 & 524.

arrangements that carriers voluntarily have negotiated on a commercial basis, competitive LECs will continue to have access to UNE-P priced at TELRIC plus one dollar until the incumbent LEC successfully migrates those UNE-P customers to the competitive LECs' switches or to alternative access arrangements negotiated by the carriers.⁶⁰

In addition, FCC Rules 51.319(d)(2)(i) and (iii), read together, provide that during the transition period, an ILEC must unbundle local switching so that CLECs may serve their embedded base of end-user customers. These rules specify that:

(i) An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops.

* * * * *

(iii) Notwithstanding paragraph (d)(2)(i) of this section, for a 12-month period from the effective date of the Triennial Review Remand Order, an incumbent LEC shall provide access to local circuit switching on an unbundled basis for a requesting carrier to serve its embedded base of end-user customers.⁶¹

Although some other provisions of the *Triennial Review Remand Order* did reference UNE-P arrangements rather than UNE-P customers, the provisions cited above are the ones most directly addressing the transition terms, and make clear that the Commission *never limited the embedded base transition period* to include only existing lines and UNE-P arrangements.

Grasping for straws, these BOCs argue that the "embedded base of end user customers" in Rule 51.319(d)(2)(iii) really means the embedded base of *lines*. This interpretation not only ignores the plain words used by the Commission, but also its stated intent. The Commission

⁶⁰ *TRRO*, ¶ 199.

⁶¹ 47 C.F.R. § 51.319(d)(2)(i) & (iii).

wanted to ensure that the transition period will not serve as a means for an ILEC to frustrate a CLEC's ability to serve its embedded customers.⁶²

A number of state commissions have construed the *Triennial Review Remand Order* in this manner which is the most logical and reasonable interpretation of it.⁶³ For these reasons, the Commission should on reconsideration clarify that CLECs may add new lines for existing customers or obtain de-listed UNEs when existing/embedded customers move to different locations.

VII. THE COMMISSION SHOULD ELIMINATE OR MODIFY THE 10 DS1 TRANSPORT CAP

A. The 10 DS1 Transport Cap Should Be Eliminated

The *Triennial Review Remand Order* fails to adequately support the 10 DS1 transport cap on routes where there is no impairment for DS3 transport. The Commission did not consider additional costs for collocation, conversions, multiplexing and many other deployment and administrative costs. Nor did it consider the administrative delays associated with having to

⁶² See *TRRO*, ¶ 226 n.626 (noting that the transition plan be implemented in a manner that avoids harmful disruption in the telecommunications markets).

⁶³ See, e.g., *Cbeyond Communications, et al. v. Illinois Bell Tel. Co.*, consolidated, Doc. Nos. 05-0154, 05-0156, 05-0174, Order, at 16-17, 20, 23 (Ill. C.C. June 2, 2005) available at <http://eweb.icc.state.il.us/e-docket>; *Petition of Pennsylvania Carriers' Coalition for an Emergency Order Mandating a Standstill of Ordering and Provision Arrangements*, P-00052158, Emergency Order, at 6 (Pa. P.U.C., Apr. 7, 2005); *In the Matter of Complaints Against BellSouth Telecommunications, Inc. Regarding Implementation of the Triennial Review Remand Order*, Docket No. P-55, Sub 1550, Order Concerning New Adds, at 12 (N.C. U.C. Apr. 6, 2005); *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Docket no. 28821, Order on Clarification, at 1 (Tex. P.U.C. Mar. 16, 2005); *In the Matter of a General Investigation to Establish a Successor Standard Agreement to the Kansas 271 Interconnection Agreement, Also Known as the K2A*, Docket No. 04-SWBT-763-GIT, Order Granting in Part and Denying Part Formal Complaint and Motion for an Expedited Order at 5-6 (Kan. C.C. March 10, 2005); available at <http://www.kcc.state.ks.us/docket/cal.cgi>; *In the Matter, on the Commission's own motion, to commence a collaborative proceeding to monitor, and facilitate implementation of Accessible Letters issues by SBC Michigan and Verizon*, Case No. U-1447, Order, at 6 (Mich. P.S.C. Mar. 9, 2005).

collocate and deploy facilities. Because there is inadequate support to justify the rule and because it fails to address fully other cost issues that should be considered in such a cut-over analysis, the 10 DS1 cap is unreasonable and, therefore, unlawful.⁶⁴ The Commission should accordingly eliminate any such cap to the extent it exists.

B. At a Minimum, The 10 DS1 Transport Cap Should Not Apply On Routes Where DS3 UNEs Are Available

If the Commission does not eliminate the 10 DS1 transport cap, the Commission should, at least, hold that it does not apply on routes where DS3 UNE transport is available. BOCs argue that where DS3 UNE transport is available, if there were no DS1 cap, "there would be no limitation on DS1 transport circuits in the absence of DS 3 impairment...and CLECs could obtain 12 UNE DS3 transport circuits on a route where such UNEs are available, as well as another 100 or 1,000 DS1 circuits."⁶⁵ BOCs contend that this outcome would circumvent the 12 DS3 transport cap and the Commission's finding that CLECs are not impaired without access to more than 12 DS3 transport facilities per route.⁶⁶

Petitioners are not seeking to "evade" the 12 DS3 cap that is in place where DS3 UNE transport is available. Rather, Petitioners seek the ability, as required under the Act, to access DS1 UNE transport facilities on routes where the Commission found they are impaired up to the 12 DS3 transport limit. Tellingly, the Commission *never concluded that CLECs are "non-impaired" without access above 10 DS1s on transport routes where DS3 UNEs are available.* It

⁶⁴ *Sinclair v. FCC*, 284 F. 3d 148, 162 (D.C. Cir. 2002) (administrative lines drawn must not be patently unreasonable, having no relationship to the underlying problem); *Damsky v. FCC*, 199 F.3d 527 (D.C. Cir. 2000) (acknowledging that a Commission decision must be based on the relevant factors and its findings must be supported by substantial evidence).

⁶⁵ SBC at 10; *see also* Verizon at 19-20; Qwest at 3.

⁶⁶ Verizon at 19; SBC at 10.

would be entirely illogical and arbitrary for the Commission to make such a finding. Therefore, the only permissible purpose of a DS1 transport limit would be to prevent CLECs from obtaining DS3s where they are not impaired, *i.e.* from obtaining DS1s that exceed the capacity level of 12 DS3s where DS3 transport UNEs are available. Petitioners would not object to a DS1 transport cap equivalent to the capacity of 12 DS3s.

BOCs also contend that to the extent a CLEC has more than 10 DS1s on a given transport route where DS3 UNEs are available, a reasonably efficient CLEC would incur the costs of provisioning the DS1 circuits by collocating at each end of the route and multiplexing them onto a single DS3 UNE.⁶⁷ This argument has no support in the record.

Further, as noted, the Commission never held in the *Triennial Review Remand Order* that CLECs are not impaired without access to more than 10 DS1 transport circuits on a given route. In fact, the Commission found that requesting carriers are impaired without access to DS1-capacity transport on all routes except those connecting two Tier 1 wire centers.⁶⁸ The Commission held that outside of these routes, “competing carriers generally cannot self-provide DS1 transport” and that a “carrier requiring only DS1-capacity transport between two points typically does not have a large enough presence along a route (generally loop traffic at a central office) to justify incurring the high fixed and sunk costs of self-providing,” which includes collocating and multiplexing, DS1 facilities.⁶⁹

⁶⁷ Verizon at 20-21; SBC 13-14; BellSouth at 18-19; Qwest at 3.

⁶⁸ *TRRO*, ¶ 126.

⁶⁹ *TRRO*, ¶ 126 (citing *TRO*, ¶ 391).

In any event, where DS1 and DS3 UNE transport facilities are available, CLECs have every incentive to utilize the most economic and efficient means by which to provision the transport. Contrary to the BOCs' assertions,⁷⁰ this may or may not involve collocating and provisioning multiplexing below the 12 DS3 cap. Of course, to the extent a CLEC is already collocated at both ends of a transport route, it may be more appropriate in those limited circumstances to apply the 10 DS1 transport cap because multiplexing may be cost justified in such instances. Even so, marketplace incentives already force the CLEC to operate in a cost-effective and efficient manner and thus no regulatory intervention (*i.e.*, imposing a 10 DS1 cap where CLECs are collocated on both ends of a transport route) is necessary to ensure that they are efficiently operating. For these reasons, the Commission should reject the BOC's contentions and eliminate the 10 DS1 transport cap on routes where DS3 UNE transport is available.

C. The 10 DS1 Transport Cap Should Not Apply to the Transport Portion of an EEL

BOCs contend that the DS1 transport cap should not be eliminated when DS1s are purchased as part of an EEL based on the argument that it is more economical and cost effective for CLECs to collocate at the wire center and multiplex DS1s onto DS3 transport facilities when the CLEC has more than 10 customers being served from that wire center.⁷¹ As discussed above,⁷² this argument is without merit.

⁷⁰ Verizon 12-13; SBC at 11-12.

⁷¹ Verizon at 22, SBC at 13-14; BellSouth at 21; Qwest at 2-4.

⁷² *Supra*, p. 30.

Moreover, if the Commission finds that CLECs may not obtain DS1 UNE transport associated with an EEL above a 10 DS1 transport cap, there may not be competitive wholesale transport providers that offer alternative wholesale DS1 EELs or the DS1 transport needed for the EEL combination. Even if there were, CLECs will likely face extremely high economic and operational barriers in trying to have these different providers combine separate loop and transport facilities in a manner that produces a substitute to a ILEC's UNE DS1 EEL offering. These high economic and operational costs include the inability of CLECs to obtain reasonable and timely cross connects between the loop and transport facilities as well as customer unwillingness to accept the delays and uncertainty associated with trying to have basic DS1 facilities provisioned through two alternative wholesale providers.⁷³

The Commission should therefore base the availability of EELs on the availability of DS1 loops (*i.e.*, the availability of unbundled DS1 transport should not limit the availability of a DS1 EEL). This is appropriate because when used as part of a DS1 EEL, DS1 transport merely extends the reach of the loop. Furthermore, DS1 transport used in an EEL does not aggregate traffic from multiple customers. Instead, the DS1 transport portion of the DS1 EEL is dedicated and provides service to a single customer.⁷⁴

As the Commission recognizes, a DS1 EEL "extends the geographic reach for competitive LECs because EELs enable requesting carriers to serve customers by extending a customer's loop from the end office serving that customer to a different end office in which the

⁷³ See TRO, ¶¶ 303-304.

⁷⁴ See TRO, ¶ 576.

competitive LEC is already located.”⁷⁵ Because of this, a carrier’s ability to recoup the costs of a DS1 EEL depends solely on the revenue from the single customer served by that EEL.⁷⁶ Thus, DS1 transport when used to extend the reach of a DS1 loop shares the same economic hardship characteristics of a loop and carriers are, at a minimum, equally impaired (if not more so) without access to DS1 EELs as they are without access to stand-alone DS1 loops.⁷⁷

VIII. THE COMMISSION SHOULD CLARIFY THAT ILEC FACILITIES AT REVERSE COLLOCATIONS AT CLEC PREMISES ARE DEDICATED TRANSPORT, NOT ENTRANCE FACILITIES

In the *Triennial Review Remand Order*, the Commission held that dedicated transport includes incumbent LEC transmission facilities between wire centers or switches. In footnote 251, the Commission explained that “wire center” also includes “any incumbent LEC switches...that are ‘reverse collocated’ in non-incumbent LEC collocation hotels.”⁷⁸ As it clarified in the *TRO*, the Commission should clarify here that “wire centers” include other ILEC facilities, such as racks and transmission electronics, that are reverse collocated for interconnection purposes at CLEC premises. Verizon is the only party that objects to this clarification.⁷⁹

First, Verizon asserts that such a ruling would “eviscerate the Commission’s finding of no impairment with respect to entrance facilities.”⁸⁰ Its position is incorrect because such a ruling would be limited to the “interconnection methodologies” referenced in SNiP LiNK’s *ex parte*. The *Triennial Review Order* recognized this and the *Triennial Review Remand Order*

⁷⁵ *TRO*, ¶ 576.

⁷⁶ *TRO*, ¶ 206.

⁷⁷ *TRO*, ¶ 206.

⁷⁸ *TRRO*, n. 251.

⁷⁹ Verizon at 25-27.

⁸⁰ Verizon at 26.

should as well since entrance facilities were not available on an unbundled basis under either order.

Second, Verizon submits that the footnotes in the *Triennial Review Order* that support this clarification are irrelevant because *USTA II* vacated all of the *Triennial Review Order*'s dedicated transport UNE decisions.⁸¹ This mischaracterizes *USTA II*. Although the D.C. Circuit did vacate, *inter alia*, the Commission's decision to subdelegate its authority to state commissions to determine whether certain transport triggers were satisfied, vacated and remanded the route specific transport analysis, and remanded the entrance facility definition, it did not vacate nor remand the Commission's clarification in footnotes 1126 and 1842 of the *Triennial Review Order*.

Third, Verizon argues that the Commission did not hold in the *Triennial Review Order* that reverse collocation of certain ILEC interconnection methodologies (which includes non-switching devices) at a CLEC premise qualified the location as a wire center for purposes of the definition of dedicated transport. In the *Triennial Review Order*, the Commission specially recognized that the definition of dedicated transport included such locations. Although it did not order the unbundling of entrance facilities because it limited "the dedicated transport network element to those incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between switches or wire centers owned by incumbent LECs,"⁸² it explained that ILECs are still obligated to provision dedicated transport where ILECs were reverse collocated because such locations were deemed part of an ILEC's network. In

⁸¹ Verizon at 26.

⁸² *TRO*, ¶ 369.

footnote 1126 of the *Triennial Review Order*, the Commission confirmed this and clarified that an incumbent LEC “may ‘reverse collocate’ in some instances by collocating equipment at a competing carrier’s premises, or may place a equipment in a common location, for purposes of interconnection.”⁸³ As discussed in the Petition, the Commission was referencing many different types of interconnection methodologies besides pure switching equipment.

Unfortunately, in the *Triennial Review Remand Order*, the Commission did not clarify its definition of dedicated transport in this manner. Nor did the Commission specify that to the extent an ILEC has equipment “‘reverse collocated’ in a non-incumbent LEC premises, the transmission path from this point back to the incumbent LEC wire center shall be unbundled as transport between incumbent LEC switches or wire centers to the extent specified.”⁸⁴ Rather, when it discussed reverse collocation in the *Triennial Review Remand Order*, the Commission only noted that dedicated transport also includes “incumbent LEC switches...that are ‘reverse collocated’ in non-incumbent LEC collocation hotels.”⁸⁵ There is no basis for departing from the more expansive clarifications rendered and supported in the *Triennial Review Order* and to clarify the record,⁸⁶ the Commission should confirm that they continue to apply.

⁸³ *Triennial Review Order*, at ¶ 369, n.1126.

⁸⁴ *Triennial Review Order*, at ¶ 369, n.1126.

⁸⁵ *TRRO*, at n. 251.

⁸⁶ *Wisconsin Valley Improvement v. F.E.R.C.*, 236 F.3d 738 (D.C. Cir. 2001) (quoting *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C.Cir.1995) (“an agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so. ‘Indeed, where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.’”); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (citation omitted) (“an agency changing its course must supply a reasoned analysis....”).

IX. CONCLUSION

Petitioners request that the Commission reconsider and clarify the *Triennial Review Remand Order*, in accordance with the recommendations herein, at the earliest possible date.

Respectfully submitted,

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Certificate of Service

I, Linda Crelling, Swidler Berlin LLP, certify that on this 20th day of June 2005, I caused a copy of the foregoing Consolidated Reply to Oppositions to which this certificate is attached to be served on the persons below by first-class mail, postage prepaid.

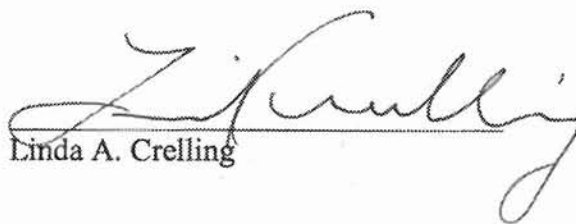
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